IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 862 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DUNGARSINH NANJIBHAI PRAJAPATI & 1 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KB ANANDJIWALA for Appellant(s) : 1 - 2.
PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 03/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The present appeal arises out of the judgment and order rendered by the Presiding Officer of City Sessions Court No.6, Ahmedabad in Sessions Case No.141 of 1995 on 31st July, 1998, convicting the appellants for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and under Section 342 of the Indian Penal Code read with Section 34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/- each and, in default in payment thereof to undergo further rigorous imprisonment for a period of two months.

2. As per the prosecution case, the incident occurred in a Bungalow No.8, Om Park Society at Vatva in Ahmedabad on 19th September, 1994 at about 9:00 p.m. In that bungalow, Godavariben (appellant No.2) was staying with her two sons, Jagdish and Dungarsinh and daughter-in-law, Rekhaben, wife of Jagdish. Marriage between Jagdish and Rekha was solemnized about four months prior to the date of incident. As per the prosecution case, on the day of incident, Godavariben picked up a quarrel with the deceased on allegation that, the deceased used to spend money after herself, which was given to her by her brother-in-law, Dungarsinh (accused-appellant No.1), which allegation the deceased denied and went into the

house to cook. The house consisted of only one room and an open courtyard in front of the house known as '*osari*' in the local vernacular.

2.1 As per the prosecution case, while the deceased was cooking Roties on the stove, appellant No.2 came into the house, poured kerosene on the body of the deceased from the kerosene tin, which was lying nearby and, thereafter, appellant No.2 came out of the room and shut the deceased inside. The room has a window on the northern wall. Appellant No.2, therefore, went to that window where accused No.1 also joined her. That window is of the size of 3'10" X 3' at a height of 2'7" from the floor. Window is grilled with vertical and horizontal bars fixed at a distance of 3 inches. It is the case of the prosecution that appellant No.1 ignited a matchstick and then handed it over to appellant No.2, who in turn, threw it on the deceased through the gaps in the grill of the window. The room is of the size of 11'4" x 10'9". The deceased caught fire with the matchstick thrown by appellant No.2 and raised shouts. On hearing the shouts, the neighbours rushed to the spot and noticed the deceased lying on the floor in the osari in front of the house. At that time, appellant No.2 also rushed to the spot. The fire on the deceased was extinguished by throwing quilts,

etc. In the meantime, husband of the deceased, Jagdish also arrived and, the husband and neighbours, took the deceased to the hospital for treatment.

2.2 At the hospital, firstly, history was recorded in the outdoor case papers, then, the deceased was shifted to the Burns Ward. In the meantime, Police Constable on duty at the hospital, was also, informed who arrived, who interrogated the deceased and on basis of information revealed by the deceased, made an entry in Wardhi Book and gave a Wardhi to the Police Station, which is also recorded by the Police Station Officer in the Station Diary and, P.S.O. in turn, informed the Higher Officer, who rushed to the hospital.

2.2.1 P.S.I., Gosai, during this course also sent an intimation (Yadi) to the Executive Magistrate summoning him, to record the dying declaration of the deceased. The Executive Magistrate arrived at the hospital and after verification as to identity recorded the dying declaration of the deceased in question answer form.

2.3 The Police made investigation in the case and recorded requisite statements etc. Panchnama of the place of

offence was also drawn. An officer of the F.S.L. was summoned at the place, who examined the place of incident and prepared a report and, ultimately, the Investigating Officer, having found sufficient material against the appellants filed charge-sheet in the Court of Metropolitan Magistrate, Ahmedabad. Since the case against the appellants was triable exclusively by the Court of Sessions, the case was committed to the City Sessions Court and Sessions Case No.141 of 1995 came to the registered.

2.4 Charge was framed against the appellants at Exh.2. They pleaded not guilty to the charge and claimed to be tried.

2.5 The trial Court after recording evidence, recorded statement of accused persons under Section 313 of the Criminal Procedure Code, where circumstances against the appellants were put to them. Appellant No.2 submitted that she is suffering from paralysis and is not in a position to perform her daily chores and submitted that the evidence was not correct.

2.6 Learned Additional City Sessions Judge, Ahmedabad, ultimately, after appreciation of evidence, came to a conclusion that the prosecution was successful in establishing the charges

against the accused (appellants) with which they were charged and recorded conviction and passed the order of sentence as stated in the earlier part of judgment.

3. The case of the appellants is canvassed by learned Advocate, Mr.Anandjiwala and is opposed to by learned A.P.P., Mr.Prachchak. The record and proceedings are before us and we have been taken through the record and proceedings by both the sides during course of their respective submissions.

4. Learned Advocate, Mr.Anandjiwala, has contended that the case of the prosecution depends on two material aspects. One the dying declarations of the deceased and the circumstantial evidence. According to Mr.Anandjiwala, as per prosecution case, there are five dying declarations. But, according to Mr.Anandjiwala,, the dying declarations are inconsistent and they improve upon the story as and when they progress. He submitted that witnesses before whom oral dying declarations are alleged to have been made have not supported the prosecution case and are treated as hostile to the prosecution. Mr.Anandjiwala, submitted that the dying declaration in form of the history given to the doctor, the F.I.R. and the dying declaration before Executive Magistrate are

inconsistent and story revealing therefrom is improbable. He submitted that the story emerging from the dying declaration making allegation against the appellants gets falsified or is rendered improbable by the circumstantial evidence in the case. Mr.Anandjiwala, submitted that undoubtedly the lady has lost life out of burn injuries but, the circumstances do rule out of the possibility of the burns being homicidal. Mr.Anandjiwala, submitted that conduct of the deceased, as well as, the appellants, as shown in the dying declaration is unnatural and render the allegations made in the dying declaration improbable.

4.1 Mr.Anandjiwala, submitted that appellant No.2 suffers from paralysis and she could not have poured kerosene on the deceased, as is alleged. Mr.Anandjiwala, submitted that, even if, the story of the prosecution is accepted at face value, there was no resistance on part of the deceased against the action of appellant No.2 in pouring kerosene over the deceased. This conduct on part of the deceased is also unnatural and unbelievable. Mr.Anandjiwala, submitted that, if there was no resistance from the deceased when appellant No.2 poured kerosene on her and, if appellant No.2 had intention to set her to fire, there was no need for appellant

No.2 to go out of the room and, then set the deceased to fire by throwing a burning matchstick from the window. Mr.Anandjiwala, submitted further that, the theory of appellant No.1 lighting the matchstick and then handing over the matchstick to appellant No.2 and then appellant No.2 throwing matchstick through the window, is also an unnatural conduct. Mr.Anandjiwala, submitted that the panchnama of the place of incident and the report of the F.S.L. Officer indicates that the place where the deceased sustained burns is at a distance of about 5 to 7 feet from the window. The window is fitted with a grill having vertical and horizontal bars fitted at the distance of three inches leaving a gap of three inch through which the matchstick is alleged to have been thrown. Mr.Anandjiwala, submitted that, it is difficult, if not possible to throw a matchstick to a distance about 7 feet. He also submitted that, even if it is thrown, a burning matchstick may not remain lit till it reaches the deceased and therefore, theory becomes improbable.

4.2 Mr.Anandjiwala, submitted that appellant No.2 is suffering from paralysis and there is no dispute on that aspect. She could not have lifted the kerosene tin and poured the kerosene. She could not have thrown the burning matchstick

as is alleged and the theory propounded in the dying declaration is, therefore, improbable.

4.3 Mr.Anandjiwala, submitted further that, as per the dying declaration, the deceased was locked into the house after kerosene was poured over her and then was set ablaze through the window. But, when the neighbours came, they noticed her lying in the osari and prosecution has led no evidence to show as to how the deceased came out of the room. Mr.Anandjiwala, submitted that, it is not the case of the prosecution that any of the accused helped her to come out and the Panchnama of the place of incident indicates that, there was no damage to the door which could be out of a forced opening by the deceased. Question therefore is, how the deceased came out of the room. If, she came out from the room without causing any damage to the door then, her story of being locked into the room by appellant No.2 gets falsified. Mr.Anandjiwala, submitted that there were no traces of kerosene found on the floor. Everything was in orderly fashion and, therefore, there was no resistance from the deceased. Mr.Anandjiwala, submitted that this is an unnatural conduct, which would render the story grossly improbable. Mr.Anandjiwala, submitted further that, appellant No.1 is not

attributed any motive by the prosecution. He could have no motive or grievance against the deceased, if his conduct is seen. Even, as per the prosecution case, he used to handover his earnings to the deceased and he had no dispute on that aspect with the deceased. If he had so-much of faith or trust in the sister-in-law, he could have no grudge or grievance against her, which would prompt him to share a common intention with the appellant No.2 and assist appellant No.2 in setting the deceased ablaze. Mr.Anandjiwala, submitted that, as per the prosecution case, clothes of both the appellants were found to carry traces of kerosene. As per prosecution case, it was only appellant No.2, who poured kerosene on the deceased. How the traces of kerosene are found on clothes of appellant No.2 has not been explained by the prosecution. It was also submitted that the conduct of the deceased is also not natural in showing no resistance when kerosene is poured, in making no attempt to shout for help and, in making no attempt to protect herself or to escape from the place. Mr.Anandjiwala, submitted that, any person who fears danger to his or her life would try to resist, would try to escape, would try to have help, but, in the instant case, she has done nothing, which is quite unnatural.

4.4 Mr.Anandjiwala, submitted that overall outcome of the prosecution case is that the dying declarations are inconsistent and show gradual improvement in the story. If the test of probability is applied, they render the story emerging from dying declaration improbable. The dying declarations and circumstances are the only evidence on which the conviction is recorded. Mr.Anandjiwala, submitted that considering various pronouncement of this Court and the Supreme court replied upon by him, appeal may be allowed.

5. The decisions can be discussed by this Court in the paragraphs to come.

6. Mr.Prachchak, has resisted this appeal. According to him, as per the law on dying declaration as settled by the Apex Court, conviction can be founded on solitary evidence in form of dying declaration. He submitted that there is no need to look for corroborative evidence. He submitted that here is a case where a young lady, aged about 19 years, who has just entered her marital life four months back, has met with her death in an unnatural way. The deceased had given consistent dying declarations. Though witnesses before whom oral dying declarations are given have initially not supported the

prosecution case, have admitted during cross-examination about the deceased having given oral dying declaration before them. Mr.Prachchak, submitted that human being is not a computer and every time the incident is narrated. Some difference is bound to creep in and it cannot be considered as a serious lapse unless, it goes to the root of the case. Mr.Prachchak, submitted that dying declarations clearly implicate the appellants, though there are minor discrepancies. The dying declarations are consistent so far as the involvement of the appellants is concerned. Mr.Prachchak, submitted that the clothes of the deceased found to have carbon particles referable to the kerosene. The clothes of both the appellants are found to have kerosene traces. The swab taken from the floor of the incident also contains carbon particles referable to kerosene. The place used for making dough contains kerosene, though in small quantity. All these factors support the dying declarations. He submitted that different persons react in different manner in a given set of situation and therefore, simply because the deceased did not react in a particular manner or simply because the appellants are alleged to have not acted in a particular manner, it cannot be said that their conduct is unnatural and, therefore, the story is not doubtful. Mr.Prachchak, submitted further that, there is

contemporaneous material in form of medical case papers, Wardhi Book maintained by the hospital and station diary maintained at the Police Station, which clearly implicate the appellants.

6.1 Mr.Prachchak, submitted that the dying declaration has a ring of truth when the deceased does not implicate her husband. He submitted that the depositions of hostile witnesses before whom the oral dying declaration is alleged to have been made, if read as a whole, it is clear that, they admit to have stated before the Police about the dying declaration. Mr.Prachchak, submitted that there is no need to look for corroboration, so far as evidence in form of dying declaration is concerned. Mr.Prachchak, also placed reliance on certain decisions.

6.2 Learned A.P.P., has also submitted that conduct of the appellants in making no attempt to help the deceased either at the place of incident or after she would be taken to hospital also speaks volume about their attitude towards the deceased.

7. We have given a thoughtful consideration to the rival side submissions and have examined the evidence from

the perspective canvassed by both the sides.

8. The prosecution case mainly depends on multiple dying declarations, both oral and written.

8.1 The first dying declaration was allegedly made by the deceased before witness-Nathubhai Amrsinh Prajapati (Exh.18) in the rickshaw, when she was being take to the hospital. Witness-Nathubhai has not supported the prosecution and has been declared hostile. He says that on hearing the shouts, he rushed out of the house and saw that deceased-Rekha was burning and was rolling on the floor. He, therefore, pulled out a quilt lying on the cot outside the house and, thereafter he and Jagdish, husband of the deceased, as well as, Jituben took her to the hospital. He says that he did not ask her anything, but, deceased asked him to take her to hospital.

8.2 During cross-examination to the learned Public Prosecutor, the witness has admitted that the deceased told him that her mother-in-law raised a quarrel with her for money matters, abused her, poured kerosene over her and, then locked her in the house and thereafter, her brother-in-law, Dungarsinh ignited a matchstick, gave it to her mother-in-law,

who in turn, threw the lighted matchstick over her, as a result of which, her clothes caught fire and she got burnt.

8.3 The second dying declaration is in form of the case history recorded by Dr.Kirit Patel in medical case papers which is produced at Exh.52. The doctor has recorded that the history was given by the patient of alleged homicidal burns at her home before half an hour by her mother-in-law, brother-in-law and sister-in-law. It appears from Exh.52, so also, from the doctor's deposition that, initially it was recorded in the case papers that the burns were caused by mother-in-law, brother-in-law, and other relatives. But, later on the words 'other relatives' is scored out and words 'sister-in-law' are written. It also appears that this change is initialled by the doctor. This dying declaration has also to be considered as an oral dying declaration before the doctor, on basis of which, the doctor has made requisite entry in the case papers.

8.4 The third dying declaration is in form of first information report, which is recorded by P.S.I., Gosai, who is examined at Exh.27 as Prosecution Witness No.10. The F.I.R. is also produced at Exh.28. Witness says that he received information from P.S.O. at about 22:10 hours on 19/9/2004

and, therefore, rushed to L.G. Hospital. He says that he got to the hospital within 15 minutes, got in touch with Dr.Kirit Patel, who introduced him to the patient. As she was conscious, he took an endorsement of the doctor and sent a Yadi to the Executive Magistrate and, thereafter, recorded the F.I.R. of Rekhaben, who was conscious. The deceased told him that her mother-in-law picked up quarrel with her saying that she spent out money after herself which her brother-in-law gave to her. Then she went to the for cooking. At that time, her mother-in-law poured kerosene over her, came out of the house, locked the door and thereafter Dungarsinh, appellant No.1 ignited a matchstick, gave it to Godavariben, appellant No.2, who in turn, threw the said ignited matchstick through the window, which fell on the person of the deceased, as a result of which her clothes caught fire and she sustained burns. The witness says that the F.I.R. was recorded in presence of the doctor, but as both the hands of the deceased were burnt, he could not take her signature. Witness says that thereafter the Executive Magistrate had arrived and recorded the dying declaration of the deceased.

8.5 The next dying declaration is recorded by the Executive Magistrate, Baldevbhai Rambhai Patel, who is

examined as Prosecution Witness No.1 at Exh.10. The dying declaration recorded by this witness is at Exh.11. From this dying declaration, it emerges that it was recorded at about 0:15 hours on 20/9/1994. In this dying declaration, the deceased said that on 19/9/1994 at about 9:00 p.m. her mother-in-law (appellant No.2) poured kerosene over her and set her ablaze. She says that her brother-in-law was also present in the room. While giving details of the incident, the deceased appears to have stated that following a quarrel with the mother-in-law, she went into the house, ignited the primus and started cooking Roti, at that time, her mother-in-law came, poured kerosene over her and, then went out of the house, locking her (deceased) in and, thereafter threw the matchstick from the window, which fell on her clothes and caught fire, she therefore raised shouts, therefore, her mother-in-law and neighbours came and threw quilts over her and extinguished the fire.

8.6 The fifth dying declaration is in form of oral dying declaration before the mother of the deceased, Jethiben. Jethiben is examined as Prosecution Witness No.2 at Exh.13. She, however, does not support the prosecution case and was declared hostile. She says that two persons came to her house

at Nadiad and told her that Rekha had sustained burns and, therefore, she herself, her brother-in-law, Govindbhai, Ramnikbhai and her son, Jagdish, all went to the hospital at Ahmedabad and met Rekha. She says that she was unconscious, her body was under bandages and she did not respond to questions put to her. She says that she stayed at the hospital for two days and that the deceased was unconscious during this time. On being declared hostile, witness is cross-examined by the learned Public Prosecutor, where she denies to have stated before Police that, her daughter was fully conscious and told her that Godavariben had quarreled with the deceased previous evening at about 9:00 p.m. alleging that, the deceased used to spend out all the money given to her by the brother-in-law, Dungarsinh. Deceased denied that allegation, the mother-in-law therefore, started giving abuses and therefore, the deceased went into the house and started preparing Roti, at that time, the mother-in-law came into the house and poured kerosene over her from the tin and, then went out of the house and locked her in. The brother-in-law was standing in the osari, he ignited the matchstick, gave it to the mother-in-law, who in turn, threw the said ignited matchstick through the window, which fell on deceased clothes and she got ignited.

8.7 Apart from the above five dying declarations, we notice that there is an entry in the O.P.D. Case Papers which is forming part of record and produced at Exh.52. That entry is made at 9:15 p.m. on 19/9/1994 which runs as under.

"alleged history of burns at 8:30 p.m. today."

We notice that there is no evidence to show as to who recorded this history and at whose behest. There is nothing to infer that this entry is made on basis of history given by the patient, deceased herself and, therefore, in our opinion this cannot be treated as dying declaration.

8.8 The dying declarations, therefore, can be divided in two parts. There are four dying declarations which are oral in nature, which are made before witnesses, Nathubhai, Jethiben, Manubhai Chhotalal Bhatt and Dr.Kirit Patel. Out of these four oral dying declarations, witnesses Manubhai Chhotalal Bhatt and Dr.Kirit Patel have reduced the disclosure in writing in their own words. Manubhai has made an entry in the Wardhi Book and Dr.Patel has made endorsement on the case papers. The version given to Nathubhai and Jethiben has no contemporaneous material lending support to them.

8.8.1 The other dying declarations are in writing which are in form of the F.I.R. and the dying declaration before the Executive Magistrate, which are reduced into writing as per the say of these witnesses in the words of the deceased herself.

9. We, now proceed to examine these dying declarations.

9.1 The first dying declaration before Nathubhai in presence of Prosecution Witness No.7, Jituben Narsinhbhai and Prosecution Witness No.5, Jagdish Nanji is not supported by any of these witnesses and they said that no such dying declaration was made. Prosecution Witness No.7 goes to the extent of saying that deceased-Rekha was unconscious. However, they have been declared hostile and in cross-examination to the learned Public Prosecutor, they admit to have stated before Police that, Rekha made a dying declaration in the rickshaw implicating the appellants, while she was being taken to the hospital.

9.2 Similar is the situation so far as oral dying declaration before Prosecution Witness No.2, Jethiben is

concerned, which is made in presence of Prosecution Witness No.3, Govindbhai. These witnesses are also declared hostile. They but, during their cross-examination admit to have made a statement before the Police that, deceased-Rekha who made a dying declaration implicating the appellants.

9.3 The third dying declaration is in form of the history recorded by the doctor on medico legal case papers by Dr.Kirit Patel who is examined as Prosecution Witness No.14 at Exh.51, wherein, it is recorded that the deceased gave a history of burns by mother-in-law, brother-in-law and sister-in-law. It appears that in place of sister-in-law, doctor had recorded other relative, which was scored out by him and then, sister-in-law was added. He has initialled this correction. The impression therefore that is created is that, the deceased implicates not only the appellants, but also, the sister-in-law.

9.4 Then comes the F.I.R. (Exh.28), where the deceased implicates the appellants only and gives a detailed version, as to how the incident occurred. Minute details are also given recording what happened prior to the incident and what happened subsequent to the incident. She says that appellant No.2 poured kerosene, locked her into the house and, then

went to the window where appellant No.1 was present, he ignited the matchstick and gave it to appellant No.2, who threw that ignited matchstick over the declarant through the window, she raised shouts, as a result, neighbours came and extinguished the fire.

9.5 In the dying declaration before the Executive Magistrate (Exh.11), the deceased has implicated only appellant No.2. So far as appellant No.1 is concerned, only his presence in the room is indicated. Here a different version also comes as to what happened after the incident when she says that on her raising shouts, her mother-in-law-appellant No.2 and neighbours came and threw quilt over her and extinguished the fire. In the oral dying declaration before Manubhai Chhotabhai Bhatt (P.W. No.8) which he has reduced in writing in form of Wardhi at Exh.23, it is indicated that, both the appellants collectively poured kerosene over her body and set her to fire. The other details are not recorded. In deposition also, Manubhai Chhotabhai Bhatt says same thing.

9.6 Now, therefore, what emerges out of these various dying declarations is that the deceased implicates both the appellants in all the dying declarations, except dying

declaration before the Executive Magistrate. In dying declaration before the Executive Magistrate (Exh.11), she does not attribute any role to appellant No.1 except, that he was present in the room. A slightly different version emerges from the oral dying declaration before Manubhai Chhotabhai Bhatt recorded in form of Wardhi at Exh.23, where deceased is alleged to have stated that both the appellants collectively poured kerosene and set her to fire.

9.7 The oral dying declarations before witness, Nathubhai and Jethiben is not supported by these witnesses, but, they do admit in their cross-examination that, they had stated before the Police that deceased had given dying declaration before them. It was therefore argued by learned A.P.P. that, these dying declarations also should be accepted as having been duly proved.

10. At this stage, before we deal with the question whether to accept these dying declarations or not, it would be appropriate to examine the legal position in this regard.

10.1 Learned A.P.P. has placed reliance on following judgments.

i) **1999 (2) G.L.H. 842 & 859 in case of Koli Chunilal Savji & Anr. Vs. State of Gujarat.**

ii) **(2002) 6 S.C.C. 710 in case of Laxman Vs. State of Maharashtra.**

iii) **(2002) 8 S.C.C. 83 in case of Rambai Vs. State of Chhattisgarh.**

10.2 Learned Advocate for the appellants placed reliance on 2006 J.T. (2) S.C. 607, unreported decision of this High Court in case of **Deviben w/o. Raghabhai @ Keshavbhai Morarbhai Vs. State of Gujarat in Criminal Appeal No.277 of 1996 decided on 13/06/2003** and, in the case of **Mohanbhai Raghavbhai Patel and Anr. Vs. State of Gujarat in Criminal Appeal NO.285 of 1977 decided on February 16, 1978**.

10.3 We have gone through the decisions and we find that the position of law as it stands today in respect of dying declaration is that, evidence in form of dying declaration is like any other evidence. Because the maker is not available for cross-examination to test its truthfulness or trustworthiness, a close scrutiny to such evidence has to be given. The Court may not look for corroboration for recording conviction on basis of

dying declaration but, probability test has to be applied to examine the trustworthiness of evidence in form of dying declaration. Surrounding circumstances have to be examined like conduct of the victim, conduct of the accused-assailants. Other circumstances emerging therefrom have to be given a close scrutiny before a dying declaration is accepted to record conviction.

10.4 Dying declaration has to be examined from two angles. Firstly, the execution part itself, that is the act of recording the dying declaration. Whether the declarant was in a position to make such a dying declaration i.e. whether she was conscious and was in a fit state of mind to give a dying declaration; whether proper method was adopted and procedure followed by the person recording the dying declaration. The second angle / aspect from which the dying declaration has to be examined is whether, what the maker of the dying declaration has declared is probable i.e. to examine whether what he has declared could have happened in the manner in which it is alleged to have occurred and for testing this aspect, the Court has to examine the surrounding circumstances.

10.5 If the evidence on dying declaration succeeds in these

two tests, the dying declaration can be accepted as sufficient evidence to record conviction, even in absence of corroboration. If either of these two tests fail, the dying declaration cannot be accepted at face value.

11. We, now, therefore, apply these two tests to the evidence on record in this regard.

12. As regards the execution part, we find that the Executive Magistrate, Baldevbhai Rambhai Patel is examined at Exh.10. He says that he received a Yadi containing endorsement of the doctor about the patient being conscious and he went to the hospital immediately. From his evidence, it is clear that he satisfied himself about the consciousness of the patient giving declaration and therefore recorded the dying declaration. He has stated that he could not obtain signature of the deceased, as her hands were badly burnt and were bandaged. Incidentally, the deceased had sustained 97 % burns. It is true that a specific opinion of the doctor regarding the patient consciousness is not obtained by the Executive Magistrate but, he has satisfied himself as to the consciousness and the mental state of the declarant. He is a responsible Officer Executive Magistrate and we certainly can rely on his

assessment and judgment in absence of any material to doubt it. Still, we have examined contemporaneous material and we find from the hospital case papers that the deceased was conscious around the time when her dying declaration were recorded. The Executive Magistrate is an independent person, having no bias one towards or against either the prosecution or the defence and we have no reason to doubt his version that, he has recorded the dying declaration, as per the say of the deceased. The dying declaration before the Executive Magistrate, therefore, passes the first test on execution aspect.

12.1 Similarly, so far as the F.I.R. is concerned, it is recorded by P.S.I., Gosai, who is examined as Prosecution Witness No.10 at Exh.27. He has deposed that when he went to the hospital, he consulted the doctor and after confirming that the patient was conscious, obtained endorsement from the doctor and sent a Yadi to the Executive Magistrate and then, he recorded the F.I.R. He says that he recorded the same in presence of the doctor. He says that he recorded the F.I.R., as per the say of the deceased. He also says that as both her hands were burnt, he could not take her signature. He says that he had put his signature below the F.I.R. and he had also made the doctor to put his signature below the F.I.R. We find

that Exh.28 contains signature of the doctor as well. The F.I.R., therefore, gets a certificate from an independent person like doctor, he also has no bias either in favour or against the prosecution or the defence. When the doctor has put his signature, we can safely accept that the F.I.R. was recorded in the manner in which it was given and that patient was conscious and in fit state of mind. Therefore, the F.I.R. also, passes the test on execution aspect. The other dying declarations are all oral.

13. Now, we proceed to apply the probability test to the dying declaration to ascertain whether the incident could have occurred in the manner in which it is declared by the declarant. In this regard, we have to examine many aspects which we propose to do in the paragraphs to follow.

14. The picture that emerges from various dying declarations is that on day of the incident, appellant No.2 quarreled with the deceased and while the deceased was cooking at about 9:00 p.m., appellant No.2 went into the room, poured kerosene over the deceased from a five litre tin of kerosene lying in the room and, then went out, locking the deceased into the room, then she went to the window, which is

in the northern wall of the room, where appellant No.1 ignited a matchstick and gave it to appellant No.2, who in turn, threw it over the deceased through the window, who was at a distance of about 7 feet from th window in the room and the deceased caught fire, she then raised shouts and the neighbours and the mother-in-law rushed and extinguished the fire.

14.1 It is not in dispute that there was no resistance from the deceased at the time when kerosene was poured. Such case is not even canvassed. It is also not in dispute that there was no resistance by the deceased when appellant No.2 allegedly tried to lock the deceased in the house. There is no dispute that although there were shutters to the window, the deceased did not try to close those shutters. This act of the deceased of total non-residence, non-opposition and surrendering to the acts of appellant No.2 appears to be quite unnatural conduct on part of the deceased. We may at this point, also, place the fact on record that, appellant No.2 suffers from paralysis of right part of the body. It is difficult for us to believe that a young lady aged about 18 to 19 years would not understand consequence of pouring kerosene over her by mother-in-law. It is also difficult for us to accept that when she

put in fear of death or even for that matter dire consequence of pouring kerosene, the deceased would not offer any resistance. This conduct appears to us to be quite unnatural.

14.1.1 That apart aspect of resistance is not emerging from any of the dying declarations. The surrounding circumstances also indicate total absence of any residence. The panchnama of the place of incident and the report made by the F.S.L. Officer also, both suggest that, everything was lying in an orderly manner. Even, the tin containing kerosene was also lying in an orderly manner. There was no sprinkling of kerosene either on the floor of any other articles of the room or on the stove. The F.S.L. Officer has opined that there were no marks of any resistance and we also are of the same opinion and the situation therefore that is shown to have occurred becomes unreconcilable.

14.1.2 Apart from the conduct of the victim, the alleged conduct on the part of the appellants also sounds to us to be unnatural. Appellant No.2 is alleged to have gone to the room and poured kerosene on the deceased. There is no evidence of any resistance or any attempt to escape by the deceased, still it is alleged that appellant No.2 comes out of the

room locking the deceased into the room and, then setting her to fire through the window with the help of the appellant No.1. There appears not any logical reason to us as to why, if the appellant No.2 was bent upon setting the deceased to fire, did not ignite the fire immediately after pouring kerosene while she was in the room when there was no resistance from the deceased. Taking of the recourse taken by appellant No.2, as is suggested, would expose her to the chances of deceased shouting for rescue after being locked into the room or even trying to save herself from the chances of being ignited by getting rid of the clothes that she was wearing, which would ultimately result into the failure of the scheme of the appellants which is alleged, which a person who was bent upon to do away with the deceased would not have done. We also notice that there is evidence to show that when the deceased raised shouts and when the neighbours came both the appellants were present there outside the house. Ordinarily, after doing such an act, a person would have tendency to escape rather than to wait and watch. There is also evidence to show that on hearing shouts, appellant No.2 also rushed to the house with neighbours. This conduct on the part of the appellants does not seem to us to be natural of a person who has committed such an heinous act as is alleged.

14.1.3 Added to this factor in favour of appellant No.2 is the fact that she stayed with the deceased in the hospital for two days. This fact emerges from evidence of Jagdish. However, learned A.P.P. has submitted that during cross-examination witness, Govindbhai and Jethiben have stated that appellant No.2 was not present. But, if those depositions are read as whole and in context of what was put to the witnesses in other part of the depositions, an impression is created that the witnesses wanted to convey that when they reached the hospital, appellant No.2 was not present. Therefore, if appellant No.2 had so-much of grievance against the deceased and had acted in the manner alleged ordinarily, she would have either escaped from the place or at least she would not have attended the hospital for two days.

14.2 There are several other circumstances apart from conduct of parties, which also attract our attention.

14.2.1 As per the dying declaration, after pouring kerosene over the deceased, appellant No.2 locked the deceased into the room and then went to the window and ignited deceased by throwing an ignited matchstick then, the

deceased raised shouts. The evidence of neighbour shows that on hearing of shouts, they rushed to the house and noticed deceased rolling on the floor in the osari and they extinguished the fire. The question, therefore, is how does the deceased come out of the house when she was locked into the house ? There is evidence to show that on hearing the shouts just as the neighbours came, appellant No.2 also came. There is evidence to show that there were no marks of any damage on the door suggestive of forced opening. Therefore, whether, it would be safe to accept the dying declaration that the deceased was locked into the room after pouring of kerosene by appellant No.2 is a question has to be answered.

14.2.2 If we examine the panchnama of the place of incident, window is of the size of 3'10" x 3' and is located in the northern wall of the room at a level of 2'7" from the floor. The window is fitted with vertical and horizontal bars located at the distance of 3" from each other which would leave gaps of the size of 3 square inches. It is the case emerging from the dying declaration that appellant No.1 ignited the matchstick, gave it to appellant No.2 and appellant No.2 threw the lighted matchstick through this window. The Panchnama also indicates that the place where the deceased appears to have sustained

burns is at a distance of 7'7" from the window. Questions were put to the F.S.L. Officer, who could not give any positive reply as to whether a lighted matchstick would or would not reach distance of about 7'7" in a lighted condition so as to ignite the clothes of the deceased. We cannot overlook the fact that the appellant No.2 is handicapped person, whose right part of the body is not properly functioning and there is no dispute on this aspect.

14.2.3 We notice from the panchnama of the place of incident that everything was found to be in an orderly fashion. There was absence of marks of pouring of kerosene or even sprinkling of kerosene. The panchnama of the place of incident, as well as, report of the F.S.L. Officer indicates a blackened strip of the size of about 2" x 10" on the floor. Barring this there were no marks of spilling of kerosene. The blackening mark is subsequently found to be containing kerosene residue when the swab is examined by the Chemical Analyst. But, if the case is of pouring of kerosene over the deceased from a kerosene tin, there has to be some traces of kerosene found on the floor ordinarily which are totally absent which has remained unexplained.

14.2.4 We also notice from the report of the F.S.L. and the panchnama of the place of incident that, there was no blackening of wall or ceiling except, some blackening on wall due to the cooking. The deceased had sustained 97 % burns. The room is a small room of the size of 10'4" x 10'9". If, the deceased sustained such heavy burns at that place as is alleged, there ought to have been some imprints of such act in the room. Unexplained absence of such marks raise doubt in our minds as to whether really incident occurred at that place and in the manner suggested.

14.2.5 The tin containing kerosene from which kerosene was allegedly poured on the deceased is found to be lying in an orderly manner. There was no spilling of kerosene from the tin. It also appears that the tine is of a size to contain 5 litres of kerosene and when measured after the incident, it was found to contain 4.750 litres of kerosene. Differently put, if kerosene was poured from this tin, how come that it was lying in orderly manner, how come that there is no spilling of kerosene, how come that there are no streaks of kerosene on the side of the tin and how come that it contains as much as 4.750 litres of kerosene. Is it that only 2.50 Ml. Kerosene was poured over the deceased which resulted into 97% burns. All

these questions remain unanswered and force us to doubt the narration of the incident given by the deceased in her dying declaration.

14.2.6 Although the F.S.L. Report indicates traces of kerosene in the clothe collected from the body of the deceased, the doctor does not speak of presence of any such smell from the person of the deceased when examined. Though there is a history of burns by pouring kerosene in the dying declaration.

14.2.7 It cannot be overlooked that appellant No.2 is paralytic and is handicapped. The facts alleged against her in the dying declaration has to be viewed with these limitations of hers.

14.2.8 Appellant No.1 is attributed role of having ignited the matchstick and having given it to appellant No.2 and in one dying declaration is indicated to be present in the room. Barring this there is no role attributed to appellant No.1 by the deceased. The deceased in her dying declaration before the Executive Magistrate, speaks nothing against appellant No.1. Appellant No.1 could not have may motive against the

deceased because, if the prosecution case is seen, the grievance that appellant No.2 is alleged to have that the deceased was spending out the money given to her by appellant No.1. Appellant No.1, if he had any grievance, he would not have followed the practice of handing over his earnings to the deceased, who was his sister-in-law and therefore, the motive is not established, so far as appellant No.1 is concerned.

14.2.9 The last but not the least is a circumstance which also cannot be overlooked. From the dying declaration, it is clear that the quarrel between the deceased and appellant No.2 started outside the house, where it is alleged that, appellant No.2 even abused the deceased and told her that she is lying and thereafter the deceased went into the room for cooking where appellant No.2 is alleged to have gone and poured kerosene. We find that there is no independent evidence of any neighbour to support the version regarding any quarrel taking place between the deceased and appellant No.2 outside the house regarding money being spent out by the deceased given to her by appellant No.1.

15. The sum total of the above discussion would

be that, if the dying declarations are tested on touchstone of probability, they suffer from a number of infirmities arising out of the conduct of the deceased, the conduct of the appellants and peripheral circumstances. We may not forget that a man may lie but circumstances don't.

16. We are, therefore, now at a point where we have a number of dying declarations on one hand and a number of circumstances on the other hand trying to counterweigh each other and we have to decide as to whether we should confirm conviction of the two appellants for the offence of murder of deceased, Rekhaben. We are unable to conclude that the dying declarations were not recorded in the manner suggested by the Executive Magistrate or the doctor of the Police, but the surrounding circumstances do persuade us to conclude that, what was told by the deceased may not be the truth and we are therefore of the opinion that the surrounding circumstances indicating lacuna in the prosecution case outweigh the dying declarations and on assessment of the evidence we are of the view that conviction cannot be confirmed. Appeal deserves to be allowed and the same is accordingly allowed. The judgment and order impugned in the appeal recording conviction is set aside. The appellants are acquitted of charges levelled against them. Accused-appellant

No.1, Dungarsinh Nanjibhai Prajapati be set at liberty forthwith, if not required in any other case. Bail bond of accused-appellant No.2, Godavariben Nanjibhai Prajapati shall stand cancelled.

(A.L.DAVE, J.)

(BANKIM N. MEHTA, J.)

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